

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
REPLY BRIEF**

77-4028

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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Nos. 77-4028
78-4047

ITT WORLD COMMUNICATIONS INC.,
RCA GLOBAL COMMUNICATIONS, INC.,

Petitioners,

- against -

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

and

TRT TELECOMMUNICATIONS CORPORATION, et al.,

Intervenors.

ON PETITION FOR REVIEW OF ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF OF INTERVENOR
TRT TELECOMMUNICATIONS CORPORATION

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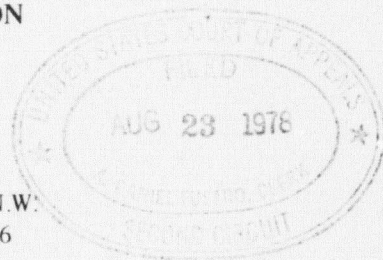


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v.

FEDERAL COMMUNICATIONS COMMISSION,
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ON PETITIONS FOR REVIEW FOR
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COMMUNICATIONS COMMISSION

REPLY BRIEF OF INTERVENOR
TRT TELECOMMUNICATIONS CORPORATION

In its opening brief, Intervenor TRT Telecommuni-
cations Corporation (TRT) demonstrated that the two orders
entered by the Federal Communications Commission (FCC or
Commission) on January 11, 1977 (JA 1) and on April 3, 1978
(JA 20) should be set aside by this Court on two separate and
independent grounds: first, that the FCC violated Section 222

of the Communications Act of 1934, as amended, 47 U.S.C. § 222, by authorizing domestic telegraph carriers to engage in international telegraph operations; and second, without regard to the requirements of Section 222, the Commission erred in authorizing such operations by such carriers, since it departed without explanation from its consistent and long-standing policy of requiring the separation of the domestic and international segments of record communications service.

TRT herein replies to the brief filed by the FCC in support of its challenged orders, as well as the joint brief filed by Intervenor Graphnet Systems, Inc. (Graphnet) and Telenet Communications Corporation (Telenet), both of whom support those challenged orders.

I.

The FCC and the Graphnet/Telenet briefs, while devoting several pages each to an attempted rebuttal of TRT's argument concerning Section 222, both fail even to address the second argument developed in TRT's brief concerning the FCC's departure from pre-existing policy in authorizing the consolidated provision of domestic and international service by a record carrier. In this respect, the approach of the Commission in this Court (and of Graphnet/Telenet) is precisely the same as the one used by the Commission in the orders here under review.

The Commission admitted in its April 3, 1978 order that in its Comments on RCA's petition for reconsideration TRT had argued that:

"the Commission departs from that policy [of separating international and domestic operations] without any investigation as to the purposes of the separations policy, why it is applicable to the new services and whether fair competition between the new entrants through services and the existing carriers is feasible." (JA 29).

But as TRT pointed out in its opening brief (Br. 10-11), the Commission's recognition of TRT's position was not followed by any FCC response to that position. Instead, the Commission in its April 3, 1978 order simply ignored TRT's argument, just as the FCC's and Graphnet/Telenet's briefs do here. Accordingly, the failure of the parties in this Court to advance any excuse or explanation for the FCC's almost adamant refusal to explain its departure from prior policy simply highlights the infirmities in the Commission's orders.^{1/}

^{1/} Both the Commission (FCC Br. 11 n.7) and Graphnet/Telenet (Br. 24) seek to leave this Court with the erroneous impression that TRT's Comments with respect to the FCC's reconsideration of its original January 11, 1977 order were "dismissed" by the FCC.

The Commission admitted that "interested parties are entitled to file comments either in support of or in opposition to a petition filed with the Commission" (JA 21), thus confirming the propriety of the Comments TRT had filed on the pending petition of RCA for reconsideration of the Commission's January 11, 1977 order. The Commission "dismissed" TRT's Comments only "to the extent TRT is requesting that the authorizations be set aside pending an evidentiary hearing," since it

Although the FCC's and Graphnet/Telenet's virtual admission, by their silence, of the merits of TRT's position perhaps makes unnecessary any additional citations of authority which respect to this question, we wish to apprise the Court of two other recent authorities which we have discovered since the filing of our opening brief that address the issue of the FCC's obligations in rendering a decision, like the one here under review, which radically departs from prior policy. In National Citizens Committee v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), cert. pending, the court dealt with the FCC's determination that the fairness doctrine would no longer apply to broadcast advertisements promoting the sale of commercial products, a decision which the court characterized as "represent[ing] a marked shift from previous FCC policy." 567 F.2d at 1099. In that context, Judge McGowan, writing for a unanimous court, laid down requirements, which are also applicable here, that the FCC must provide:

(footnote cont'd)

was only to that extent that TRT was a "party independently seek[ing] some form of relief concerning the Commission's action" going beyond the relief sought by RCA in its underlying petition for reconsideration. (JA 21).

Finally, it is noteworthy that in its order on reconsideration the Commission restated TRT's Comments as they pertained to the FCC's departure from prior policy, without suggesting in any respect that TRT's Comments in this regard could properly be ignored. (JA 29).

"an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." (Id.)

Under this standard, the court was able to affirm the Commission, since it could conclude that:

"the Commission [had] 'given reasoned consideration to each of the pertinent factors' and that its policy choices with respect to the scope of the fairness doctrine are supported by substantial, though not necessarily conclusive, evidence." 567 F.2d at 1108.

See also Garret v. FCC, 513 F.2d 1056 (D.C. Cir. 1975).

Here, there is no basis for this Court to conclude that the FCC gave the reasoned consideration that is necessary in an opinion representing such a marked shift from prior Commission policy.

II.

The FCC's and Graphnet/Telenet's attempt to rebut the showing made by TRT in its opening brief that Section 222 bars international telegraph operations by domestic carriers is no more effective than the silent treatment which they have given to TRT's contention that the FCC wrongfully departed from its prior policy without adequate explanation.

The Commission's argument on the merits of TRT's construction of Section 222 is that that section was drafted to permit the merger of Western Union and Postal Telegraph, "an event which would result in a monopoly in the provision

of domestic telegraph service." (FCC Br. 32). The Commission then argues that it is "simple nonsense" to extract from legislative history underlying a bill with this purpose a prohibition against international operations by "any domestic carrier," further observing that if Congress had intended such a prohibition "it would have said so plainly." (Id.).

This response to TRT's arguments is wholly unconvincing, for it neither denies that Section 222(a)(5) has consistently been interpreted by the FCC as barring domestic service by international carriers (except to the limited extent permitted by the gateway proviso to that section) nor does it indicate why the identical language of Section 222(a)(6) should not be construed to bar international operations by domestic carriers. Certainly, the Commission's reliance upon the underlying policy of Section 222 to impose limitations upon Western Union, a domestic carrier, can hardly justify the construction of that section which the FCC has now effectively embraced -- i.e., that it imposes more onerous limitations upon international carriers than upon domestic carriers. Indeed, it would seem that, if anything, the policy relied upon by the FCC in this regard would suggest that Congress was far more concerned with limiting the international operations of domestic carriers than visa versa.

Graphnet/Telenet take much the same tack as the Commission in responding to TRT's construction of Section 222.

See Graphnet/Telenet Br. 25, 27, where they rely upon the underlying policy of Section 222 as permitting the merger of Western Union and Postal Telegraph. They add, however, two other arguments which deserve brief mention here.

First, Graphnet/Telenet attack "TRT's concept of 'symmetry'" (Br. 26), arguing that the monopolistic structure of the domestic market and the competitive structure of the international market, as it was contemplated by the framers of Section 222, stand against TRT's in pari materia reading of Sections 222(a)(5) & (6). This argument is puzzling. Assuming the competitive aspects of the two markets were considered by the framers of Section 222, there should have been a lessening of restrictions on international carriers conduct of domestic operations and a greater restriction of domestic carriers desiring to engage in international operations.

Second, Graphnet/Telenet argue that TRT's construction of Section 222 turns upon the "unstated premise" that Graphnet and Telenet are "domestic telegraph carriers" within the meaning of Section 222(a)(2). They further contend that the FCC did not expressly find these two carriers to be "domestic telegraph carriers and it cannot be assumed that it would so classify them." (Br. 26-27). While it is true that the FCC did not explicitly so classify Telenet and Graphnet, it is quite apparent that the FCC's resolution of the issues in this

case turned upon the necessary assumption that they are "domestic telegraph carriers."

In dealing with RCA's contention that it could not interconnect its international and domestic operations, whereas Graphnet and Telenet could, the Commission held that such disparate treatment arose out of the "limitation placed upon RCA and other international telegraph carriers by Section 222." (JA 8). The necessary predicate for this determination has to be that RCA's proposed service would be "domestic telegraph operations." There could be no other basis for referring to the "limitation placed upon RCA . . . by Section 222," since that section only limits the "domestic telegraph operations" of international carriers. That being the case, there can be no principled reason for holding that the similar offerings provided by Graphnet and Telenet are anything other than "domestic telegraph operations."^{2/} Accordingly, each of those entities must be a "domestic telegraph carrier" within the meaning of Section 222(a)(2) -- i.e. a carrier "the major portion of whose traffic and revenues is derived from domestic telegraph operations."

Perhaps recognizing the weakness of their arguments on the merits under Section 222, both the FCC and Graphnet/Telenet argue that this Court should not even consider that issue, since TRT did not advance in a rehearing petition

^{2/} Graphnet/Telenet concede that the proposed offerings of the international carriers are similar to their own service offerings. (Graphnet/Telenet Br. 8 n.5).

before the Commission the construction of Section 222 which it now propounds in this Court. Like their arguments on the merits, this contention cannot save the decisions below.

In the first place, Section 405 of the Communications Act, 47 U.S.C. § 405, upon which they rely, cannot be read in a literal and mechanistic fashion to preclude every appellate argument that was not advanced in the same terms to the FCC below. As this Court has held, that section must be applied in each case with regard to the particular facts and issues presented to the agency and in court. New York State Broadcasters Ass'n v. United States, 414 F.2d 990, 994 (2d Cir. 1969). See also Action for Children's Television v. FCC, 564 F.2d 458, 468-69 (D.C. Cir. 1977); Great Falls Comm. TV Cable Co. v. FCC, 416 F.2d 238, 239 (9th Cir. 1969); Davis, ADMINISTRATIVE LAW OF THE SEVENTIES, § 20.01 (1976). Here, it is clear that an analysis of the facts and issues before the FCC, as well as this Court, clearly leads to the conclusion that Section 405 does not bar this Court's consideration of Section 222.

The issue of the application of Section 222 in this case was very much before the FCC, both in its initial order and in its order on reconsideration. As noted above (p. 8 supra), the Commission in its January 11, 1977 order addressed the limitations of Section 222 as they pertain to RCA and other international carriers, on the one hand, and Graphnet/Telenet,

on the other hand, in holding that the former carriers are prevented by that section from engaging in consolidated operations while the later two are not. It was for that very reason that TRT in its comments on RCA's petition for reconsideration averted to "the Congressional policy inherent in Section 222 of the Communications Act," which had animated the FCC's actions over the past thirty-four years in implementing the "policy of separation of international and domestic record communications." (JA 700).

To be sure, TRT did not lay out for the FCC an extensive analysis of the legislative history of Section 222 and a comparison of the various provisions of that section. However, the fact that TRT laid more emphasis upon the history and text of Section 222 in this Court in no way bars consideration of the Section 222 issue here. See Ridge Radio Corp. v. FCC, 292 F.2d 770 (D.C. Cir. 1961).

In the Ridge Radio case, petitioner complained in the court of appeals that it had had inadequate notice from the Commission that its failure to take prescribed action within defined time limits would result in a waiver of the petitioner's "Ashbacker" rights to a comparative hearing. Its petition for rehearing before the Commission, however, had emphasized only the failure of the Commission in its discretion to waive the rule which underlay the Commission's action. Holding that Section 405 did not bar petitioner's pursuit of its appellate remedies, the court stated:

"But the Act does not limit our review to matters stressed in the petition for reconsideration. In view of the contentions and presentations as a whole, before the Commission and this court, we would not feel justified in failing to decide the case on the question of notice." 292 F.2d at 773 n.8.

The same observation applies here, since the contentions raised by the parties as a whole, in the light of the Commission's orders, plainly indicates that the Commission had the Section 222 issue before it when it decided this case. See also, Office of Communication of the United Church of Christ v. FCC, 465 F.2d 519, 523-24 (D.C. Cir. 1972).

A further reason to reject the Section 405 contention advanced here is that TRT's Section 222 argument falls within well recognized exceptions to the administrative exhaustion doctrine, so that this argument could have been raised here even if it had not been articulated below.^{3/}

As TRT has demonstrated, the Commission's disregard of the limitations of Section 222 is disruptive of the entire legislative scheme contemplated by Congress. Such matters can be presented in judicial review proceedings, even if not raised before the administrative agency. Board of Public Instruction v. Finch, 414 F.2d 1068, 1073 (5th Cir. 1969). Cf. Elgin, Joliet & E.Ry. v. Ben. J. Harris & Co., 245 F. Supp.

^{3/} Graphnet/Telenet admit that "Section 405 of the Communications Act codifies the doctrine of exhaustion of administrative remedies." (Graphnet/Telenet Br. 25).

467, 472 (N.D. Ill. 1965), recognizing in a primary jurisdiction context that "the latitude for judicial action in controversies such as the one before this court is determined by the imperative of preserving the consistency of the regulatory scheme designed by Congress."

A second and related exception to the exhaustion doctrine which would have excused TRT's failure to raise the Section 222 issue below was articulated by the court in Reese Sales Co. v. Hardin, 458 F.2d 183, 187 (9th Cir. 1972):

"when the agency lacks power or jurisdiction to proceed . . . the action of an agency can be challenged on review, in the absence of a timely objection [before the agency itself]."

See also United States v. Tucker Truck Lines, 344 U.S. 33, 38 (1952). Here, Section 222 has stripped the FCC of any power it might otherwise have to allow domestic telegraph carriers to engage in international operations. Thus, it is clear that this Court can address the Section 222 on its merits.

CONCLUSION

For the reasons stated in TRT's opening brief and in this reply brief, the FCC's orders of January 11, 1977 and April 3, 1978 should be set aside.

Respectfully submitted,

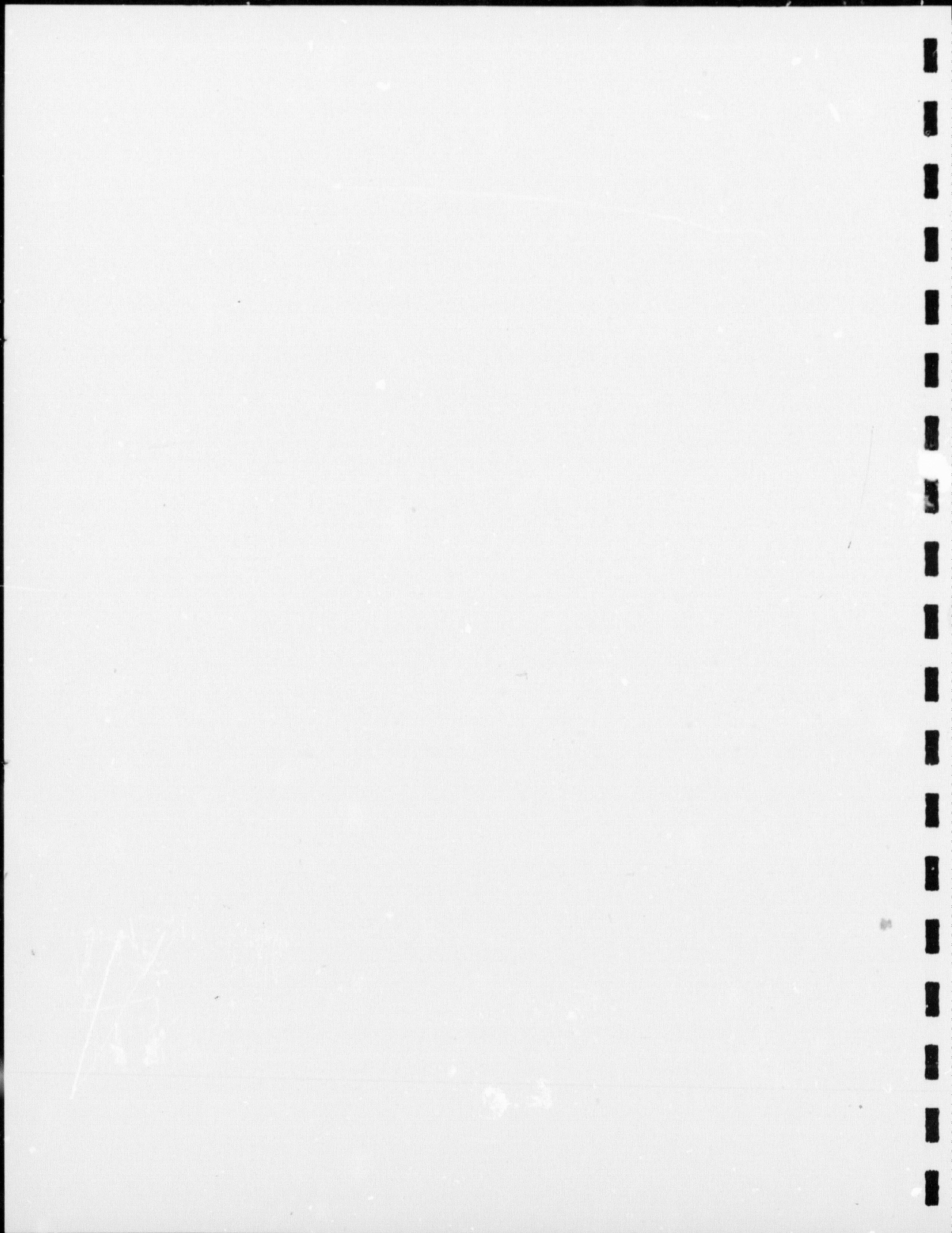
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CERTIFICATE OF SERVICE

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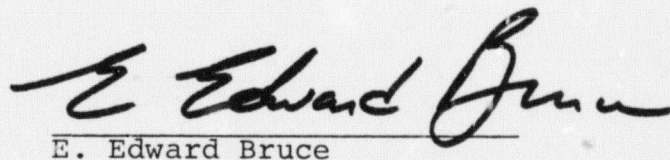
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